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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

72-259

IN THE MATTER OF

DR. JOANNA ALOGDELIS,

Petitioner,

v.

BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, BOARD OF HIGHER EDUCATION, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, JOHN W. KNELLER, HARRY G. ALBAUM and ARTHUR H. KAHN,

Respondents,

For Judgment Under CPLR Article 78.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HARRY GROSSMAN,
Attorney for Petitioner,
551 Fifth Avenue,
New York, N. Y. 10017.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

In the Matter of

DR. JOANNA ALOGDELIS,

Petitioner,

v.

BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, BOARD OF HIGHER EDUCATION, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, JOHN W. KNELLER, HARRY G. ALBAUM and ARTHUR H. KAHN,

Respondents,

For Judgment Under CPLR Article 78.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joanna Alogdelis, respectfully shows:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on July 7, 1972.

Opinions of the Court Below

The Court of Appeals of the State of New York rendered no opinion herein other than to state that the "Motion for relief to appeal denied."

This case was first heard by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and an opinion was rendered on May 8, 1972, reading as follows:

> "In our opinion the determination under review is, upon the entire record, supported by substantial evidence."

There is annexed hereto and marked Appendix "A" the Order dismissing the proceeding by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated May 8, 1972.

Also annexed hereto and marked Appendix "B" is the Judgment entered on May 25, 1972.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the U. S. Code, Section 1257(3).

Questions Presented

Neither the Court of Appeals nor the Appellate Division of the Supreme Court, Second Judicial Department, gave any legal reasons for sustaining the determination of Respondent, Brooklyn College, in this case, which determination led to the unlawful and unjust dismissal of the Petitioner from her position with said Respondent.

The conclusion reached by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department was erroneous and not supported by substantial evidence.

The Court of Appeals merely denied leave to appeal.

It is respectfully submitted that there are very cogent reasons underlying the petition for the issuance of a writ and they are as follows:

1. Whether the originial charges against the Petitioner violated the principle of "Academic Freedom" and violated her First Amendment right to freedom of speech.

2. Whether any alleged charges concerning the psychiatric fitness of the Petitioner which were never included in the original charges could be made the basis of her dismissal even though Petitioner was never given a full or proper hearing thereon.

Statement of the Case

This proceeding was originally commenced in the Supreme Court, Kings County, by the service of an Order to Show Cause. This proceeding was by a member of the Faculty of Brooklyn College pursuant to Article 78 of the Civil Practice Law and Rules seeking to restore petitioner to her position as a member of the said Faculty. The Petitioner was removed and suspended as a member of said Faculty after certain neglect of duty charges were sustained. Having raised questions under Subdivision 4 of Section 7803 of the Civil Practice Law and Rules, the said proceeding was transferred to the Appellate Division, Second Department, by the Supreme Court, Kings County, pursuant to an order which was entered November 15, 1971. The said Appellate Division then unanimously con-

firmed the determination of the respondent, Brooklyn College and dismissed this proceeding on the merits, without costs. Leave was then sought to appeal this very important matter to the Court of Appeals of the State of New York and an application for leave to appeal was made.

The same was denied by Order made on July 7, 1972.

The relevant and pertinent facts involved herein are as follows. Petitioner joined the faculty of Brooklyn College by invitation in September 1949, with the rank of Assistant Professor in the Department of Speech and Theatre and remained with such rank for a period of twenty (20) years. An application was made in 1969 by the petitioner for retroactive promotion to the rank of Associate Professor but the same was denied without just cause. Thereafter, because the petitioner protested the unfairness of being denied a promotion for a period of twenty (20) years, she was served with charges calling for her removal as a member of the instructional staff of Brooklyn College for so-called conduct unbecoming a member of the staff and suspending her from the staff.

Alleged hearings on the charges took place on two (2) dates and subsequently the petitioner was advised by the President of Brooklyn College that the charges were being dropped and the suspension against her was being lifted. At the same time the petitioner was advised that she was being granted a leave of absence on a psychiatric basis although petitioner had merely applied for leave on a physical medical basis.

At this point it should be noted that the original charges were improper as evidenced by their withdrawal. Secondly, it became obvious that the second hearing on September 29, 1970 on said alleged charges constituted an im-

proper psychiatric medical hearing on alleged charges which had never been served upon the petitioner. To counter-balance the improper procedures which had been followed, petitioner consulted an outstanding psychiatrist for a psychiatric evaluation and he categorically stated that the petitioner did not have any mental illness.

Next came new charges against the petitioner for alleged neglect of duty which resulted entirely from the previously withdrawn charges and the illegal and improper action heretofore taken against the petitioner. New hearings were then allegedly held and petitioner was advised that the neglect of duty charges had been sustained and a recommendation was made that she be retired for an alleged false disability.

All of the alleged hearings held were improper and illegal. The Establishment failed to adhere to proper procedures. At none of the hearings was the petitioner ever represented by counsel of her choice. She received no opportunity to properly defend herself. The audacity of the administration in contacting members of the petitioner's family and arranging for them to participate in one of the hearings was wholly improper. The petitioner was not given an adequate opportunity to present her condition and thoughts to the psychiatrists which the respondents had her examined by.

The tragedy of the case at bar is that a twenty (20) year career as a member of the Faculty of Brooklyn College was suddenly interrupted by the bias and prejudice of the President of Brooklyn College who was offended by the way the petitioner protested her failure to receive any kind of justified promotion for so long a period of time. She stood by for many years while other colleagues with less entitlement were promoted. The gross injustice involved finally caused petitioner to dramatize her deep feel-

ings by a classroom assignment which the President of Brooklyn College refused to tolerate.

Accordingly, there is involved in this proceding a serious question concerning the violation of the principle of Academic Freedom. Because of the personal pique of a college president, there ensued a series of illegal, erroneous, unlawful and unjustified acts against the petitioner. When it became obvious that the petitioner's rights were being violated and that the procedure was illegal, the original charges were withdrawn and a hasty retreat was beat by the President. Then came a series of event which tried to correct the errors and illegalities that had previously occurred.

Joining with the President of Brooklyn College were two of his associates, the Dean of the Faculties and the General Counsel of the Board of Higher Education. The respondents in this proceeding are revered institutions and important fixtures of the academic community. However, despite those distinguished adversaries, it is obvious that a grave injustice has been perpetrated. The petitioner is not abnormal, is not psychotic and is not in need of psychiatric treatment. She merely could no longer resist the injustice that had been done to her.

The above facts clearly disclose that the original charges brought against the petitioner were withdrawn by the respondents because there was not a scintilla of evidence indicating that said charges could be legally sustained. Said charges were an utter violation of the principle of "Academic Freedom." Said charges could not sustain any incidents or threats to school discipline. In other words, said original charges violated the fundamental constitutional rights of the petitioner.

REASONS FOR GRANTING OF THE WRIT

I

The original charges against the petitioner violated the principle of "Academic Freedom" and violated her First Amendment right to freedom of speech.

The main thrust of the original charges seeking the removal of the petitioner as a member of the instructional staff of Brooklyn College constituted a drastic violation of the principle of "Academic Freedom."

The petitioner was charged with conduct unbecoming a member of the staff of said College because she sought to have detailed and voluminous correspondence with the Dean of Faculties and the Chancellor's office concerning her failure to be promoted to a higher rank. The other charge preferred against the petitioner herein was that she gave a certain assignment to her classes which the President of the College deemed to be slanderous and malicious.

It is here respectfully contended that these two original charges against the petitioner were never sustained and were, in fact, withdrawn. However, it is these charges which brought about and started these entire proceedings against her. The said charges were invalid and void *ab initio*, and therefore any punishment or other proceedings which grew out of said initially defective charges are similarly bad, void and of no legal consequence.

Certainly, the first charge which alleges that the petitioner wrote letters to the Dean of Faculties and the Chancellor concerning the fact that she had been unjustifiably passed over for promotion cannot be deemed any possible reason or justification for the dismissal of the petitioner. Nor does such conduct on the part of the

petitioner constitute conduct unbecoming to a member of the staff.

Further, the second charge against the petitioner which seeks to sanction and censure the type of assignment that the petitioner gave to her classes is equally inconsequential and constitutes a serious infringement on the academic freedom which is normally allowed to any faculty member. In any event, the attempt by the President of Brooklyn College to limit a faculty member from expressing her personal views in a classroom cannot possibly be grounds for suspension of such faculty member.

It is well accepted doctrine that by engaging in teaching, one does not give up one's right to freedom of belief, speech or association. In fact, the First Amendment to the Federal Constitution prohibits improper restraints on voluntary public expression of ideas and protects a man or woman who wants to speak or publish when others wish him or her to be quiet.

The expression of controversial and unpopular views is precisely what is protected by both the Federal and State Constitutions. In absence of legislation, administrative officials may not exercise prior restraints on First Amendment rights. See: *People* v. *Solomonow*, 56 Misc. 2d 1050 (1968).

Accordingly, it must be concluded that this Court should not sanction or encourage Administrators or Presidents of Colleges to make charges against teachers whose utterances were unorthodox, though not criminal. If such conduct were to be sanctioned or allowed, then we might well have a shadow cast over our classrooms and universities of the very kind the First Amendment was designed to avert—namely, the shadow of the censor, the policeman and inquisitor. See: Concurring Opinion of Judge Fuld

in *Matter of Boikoss* v. *Aspland*, 24 N. Y. 2d 136, 145 (1969).

This Court declared in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967), as follows:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

It might therefore be logically argued that a teacher, the petitioner herein, should never have been brought up on charges in connection with the statements or discussions she had with her students.

The vital necessity of freedom of expression by the faculty in our colleges was also clearly set out by this Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957):

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to

> gain new maturity and understanding; otherwise, our civilization will stagnate and die."

The importance of "Academic Freedom" was discussed in the scholarly opinion of District Judge Weinstein, in *Albaum* v. *Carey*, 283 F. Supp. 3, 11 (1968) E. D. N. Y.:

> "The considerations which militate in favor of academic freedom—our historical commitment to free speech for all, the peculiar importance of academic inquiry to the progress of society, the need that both teacher and student operate in an atmosphere of open inquiry, feeling always free to challenge and improve established ideas—are relevant to elementary and secondary schools as well as to institutions of higher learning."

Another case in point is *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968), which dealt with the power of the Board of Education to discharge a high school teacher for sending a letter to the local newspaper criticizing the Board and the district superintendent of schools for their fiscal policies. The Board insisted that the letter was disruptive of faculty discipline and would tend to foment controversy, conflict and dissension among teachers, administrators and residents of the district. The Court there held that the Board had violated the teacher's first amendment rights.

The very recent case of *James* v. *The Board of Education of Central District No. 1, et al.*, decided on May 24, 1972, by the United States Court of Appeals for the Second Circuit, Docket No. 72-1109 (discussed on p. 3 of New York Law Journal for May 25, 1972), held that we can not countenance censuring by school authorities of a teacher's speech merely because they do not agree with

teacher's philosophies or leanings. Judge Kaufman, in speaking for a unanimous Court held:

> "More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students. Cf. *Keyishian* v. *Board of Regents*, supra."

In another part of the same opinion, Judge Kaufman made the following concise and clear statement:

> "* * *, but if anything is clear from the tortuous development of the first amendment right, freedom of expression demands breathing room. To preserve the 'marketplace of ideas', so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement."

In our instant case, we have a clear example of a violation of the petitioner's right of academic freedom—namely, the right to disagree. Obviously, the respondents themselves recognized the weakness of their position and saw fit to withdraw the original two charges preferred against the petitioner. However, since all of the other proceedings herein evolved out of the two initial charges, the same must also fall and be dismissed or discontinued.

II

Any alleged charges concerning the psychiatric fitness of the petitioner were never included in the original charges and petitioner never was given a full or proper hearing thereon.

The record clearly shows that the original two charges against the petitioner were dropped. However, by tricky and devious means, the request of the petitioner for a leave of absence because of physical illness for the period from September 15, 1970 through January 20, 1971, was converted by the respondents herein to what amounts to charges concerning her psychiatric fitness to continue teaching.

It is particularly to be noted that the original two charges preferred against the petitioner make no mention whatsoever concerning her psychiatric fitness to teach classes and make no mention of any such charge. When the respondents realized the weakness, paucity and inadequancy of the two charges made against the petitioner, they dropped those charges and converted the hearing to one concerning the fitness of the petitioner to continue teaching. This was all done without any formal or written charges being served upon the petitioner. She was obviously unprepared to meet such new charges and had no inkling of the turn that said hearing would take.

Also, since the petitioner who appeared on her own behalf is not an attorney, she was not even prepared to argue or object at said hearings to the dastardly attempt to turn them into a hearing concerning her fitness to continue teaching. However, fortunately, the established case law is clear to the effect that the petitioner herein is entitled to receive full and adequate notice of any and all charges preferred against her before the hearings so that she may be properly prepared to defend herself.

Therefore, it is respectfully contended that the petitioner herein was never awarded a fair and impartial hearing by reason of the fact that she was never served or apprised of any additional, substituted or amended charges or allegations against her. This procedure violated her due process and constituted an abuse of discretion on the part of the respondents herein.

The leading case of *Matter of Hecht* v. *Monaghan*, 307 N. Y. 461 (1954) held that a person has a constitutionally guaranteed right to know in advance of the hearing what evidence would be considered and what the exact nature of the charges would be. That case is also the New York authority for holding that a party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.

It is also well established in our case law that no essential element of a fair trial can be dispensed with in an administrative hearing, unless waived. In our case, the petitioner may not be obligated to show that she had a meritorious defense to the charges concerning her psychiatric fitness to teach because she was denied due process in the bringing forth of such charges against her.

In *Matter of Boyd* v. *Collins*, 11 N. Y. 2d 228 (1962), the Court held that it is a violation of tenure rights (Education Law #3013) to remove, without proper charges and hearing a teacher who has tenure.

One of the first fundamental rules of due process is that any accused person is entitled to notice of charges. This principle is equally applicable to administrative proceedings. In *Matter of Murray* v. *Murphy*, 24 N. Y. 2d 150 (1969), it was held that a public employee has a claim to

due process and may assume that the hearing will be limited to charges as made, and that after hearing is in progress or concluded, that the charges will not be switched or changed.

It is an established fundamental constitutional right to be put on notice of the charges preferred. In fact, prejudice will be presumed when such charges are enlarged, changed or switched. This type of situation occurred in the *Murray* case, *supra*, where Judge Keating, in his opinion, aptly stated at page 157:

> "The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged. (*Matter of Ruffalo*, 390 U. S. 544; *Matter of Shapiro* v. *Board of Regents*, 16 N. Y. 2d 783; *Matter of Hecht* v. *Monoghan*, 307 N. Y. 461, 473-474; *Cole* v. *Arkansas*, 333 U. S. 196; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 339-340.)
>
> * * *
>
> "Where we are involved with such a fundamental constitutional right as the right to be put on notice of the charges made, prejudice will be presumed."

From all of the above, the conclusion is inescapable that due process requires a fair and open hearing with not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party in order to meet them. In *Bolles-Texas Corp.* v. *Board of Standards and Appeals*, 53 Misc. 2d 798 (1967), the Court held that the test of due process in a proceeding to review determinations of administrative boards is that there be fair notice of the charge or claim made as well as a fair opportunity to defend the same.

This principle was also succinctly stated in *Matter of Citron* v. *O'Shea*, 244 App. Div. 158, 159 (1st Dept.—1935) as follows:

> "Opportunity to be heard is not afforded if the party who is entitled to that opportunity is not informed of the nature of the charges until after it has been sustained. The right to a hearing necessarily presupposes that the party to be heard shall at least at some time before final decision be advised of the accusation which is to be met."

The above statement was quoted with approval in *Matter of Merritt* v. *Swope*, 267 App. Div. 519, 523 (1st Dept., —1944), where the Court also went on to state that a hearing must be fair in all respects and not a mere form to precede a predetermined result.

This doctrine was also enunciated by the Supreme Court of the United States in *Morgan* v. *United States*, 304 U. S. 1, 18 (1937) where the following concise language was used by Chief Justice Hughes:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

In other words, one should be and is entitled to be fairly advised in advance of what the other side proposes and to be heard upon such proposal before it issues its final order.

In our instant case, no such reasonable opportunity was accorded to the petitioner. The administrative proceedings were initiated by notice of charges and notice of hearing. However, those charges were dropped in their

entirety during the hearing and new ones of a medical nature were proposed and injected into the pending proceedings. The petitioner was obviously unprepared for such a turn of events and could not meet such new charges on such short notice.

Therefore, the fundamental requirement of fairness which is the essence of due process in a proceeding of this nature was completely lacking here.

Since the hearings had all the essential elements of a contested proceeding, the petitioner had the right to know in advance the exact nature and scope of all possible charges preferred against her before the proceedings started. The petitioner should have been advised in advance that her psychiatric fitness was in question and she should have been given a full and reasonable opportunity to know all the charges and claims advanced against her before the hearings began.

For all of these reasons, the petitioner herein was denied her right of due process.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

HARRY GROSSMAN,
Attorney for Petitioner,
551 Fifth Avenue,
New York, N. Y. 10017.

APPENDIX A

Order

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County, on May 8, 1972.

Present—

Hon. James D. Hopkins, Acting Presiding Justice

Fred J. Munder
M. Henry Martuscello
Henry J. Latham
J. Irwin Shapiro, Justices

Order Dismissing Proceeding

In the Matter of

Dr. Joanna Alogdelis,

Petitioner,

v.

Brooklyn College of the City University of New York *et al.*,

Respondents.

The above named Dr. Joanna Alogdelis, petitioner, having instituted this proceeding pursuant to article 78 of the CPLR, by a petition verified August 18, 1971, to review and annul respondent Brooklyn College's determination, dated April 25, 1971; by order of the Supreme Court, Kings County, dated November 15, 1971, the proceeding was transferred to this court for determination;

the proceeding have been submitted by Harry Grossman, Esq., of counsel for petitioner and by Eric J. Bryne, Esq., of counsel for respondents; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof; it is:

ORDERED that the petition is hereby denied; determination of respondent Brooklyn College dated April 25, 1971 unanimously confirmed, and proceeding dismissed on the merits, without costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Notice of Entry

PLEASE TAKE NOTICE, that an order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department on the 3 day of May, 1972.

Yours, etc.,

J. LEE RANKIN,
Corporation Counsel,
Attorney for Respondent,
Municipal Building,
New York, N. Y. 10007

To:

HARRY G. GROSSMAN, ESQ.,
Attorney for Petitioner,
551 Fifth Ave.
NY, 10017

APPENDIX B

Judgment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Reg. 657 Fol. 2

Index No. 15733/71

In the Matter of

DR. JOANNA ALOGDELIS,

Petitioner,

vs.

BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, BOARD OF HIGHER EDUCATION, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, JOHN W. KNELLER, HARRY G. ALBAUM and ARTHUR H. KAHN,

Respondents.

For Judgment Under CPLR Article 78

The above named petitioner having moved at Special Term of the Supreme Court, Kings, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent, Brooklyn College holding her guilty of neglect of duty, recommending her retirement for disability; and to restore her to her former position, and for other related relief.

And this proceeding having been transfererd by order of said court, dated the 15th day of November, 1971, to the Appellate Division of the Supreme Court, Second Department, and that Court, in an order entered in the office of the Clerk of said Appellate Division, on the 8th

day of May, 1972, having ordered that the determination of the respondent be confirmed and the petition denied, and proceeding dismissed on the merits, without costs.

Now, on motion of J. Lee Rankin, Corporation Counsel attorney for the respondents, it is

ADJUDGED that the proceeding be and the same hereby is dismissed, on the merits.

ANTHONY N. DURSO
Clerk

Dated: May 25, 1972

Filed

Kings County Clerk's Office

Notice of Entry

PLEASE TAKE NOTICE that a Judgment, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of Kings.

New York, May 25, 1972

Yours, etc.,

J. LEE RANKIN,
Corporation Counsel,
Attorney for Respondent,
Municipal Building,
New York, N. Y. 10007

To:

HARRY GROSSMAN, ESQ.
Attorney for Petitioner
551—5th Avenue
N. Y. 10007

APPENDIX C

Order of Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1972.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

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2 Mo. No. 495

In the Matter of

DR. JOANNA ALOGDELIS,

Appellant,

vs.

BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, & ors.,

Respondents.

For Judgment &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Deputy Clerk

(Seal)

72-259

SEP 5 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

IN THE MATTER OF

DR. JOANNA ALOGDELIS,

Petitioner,

against

BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, BOARD OF HIGHER EDUCATION, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, JOHN W. KNELLER, HARRY G. ALBAUM and ARTHUR H. KAHN,

Respondents,

For Judgment Under CPLR Article 78.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

NORMAN REDLICH,
Corporation Counsel of the City of New York,
Attorney for Respondents,
Municipal Building,
New York, N. Y. 10007.

STANLEY BUCHSBAUM,
ERIC J. BYRNE,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

In the Matter of

DR. JOANNA ALOGDELIS,

Petitioner,

against

BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, BOARD OF HIGHER EDUCATION, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, JOHN W. KNELLER, HARRY G. ALBAUM and ARTHUR H. KAHN,

Respondents.

For a Judgment Under CPLR Article 78.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner seeks to have this Court review by writ of certiorari a judgment of the Appellate Division of the State of New York, Second Department, entered on May 25, 1972, which unanimously sustained a determination recommending that petitioner be retired for disability. Reported: 39 A D 2d 728, 332 N. Y. S. 2d 414.

On July 7, 1972, the Court of Appeals of the State of New York denied petitioner leave to appeal.

Facts

Petitioner became a member of the faculty of Brooklyn College, City University of New York, in 1947, reaching the rank of Assistant Professor in 1949 (R. 39a). She never attained promotion to a higher rank (R. 39a-41a, 56a).

In 1965, she began to present demands to members of the school administration that she be promoted, retroactively to 1949, to the rank of Full Professor, skipping the rank of Associate Professor (R. 40a, 55a). Her demands were to eventually total 2,000 written pages (R. 41a, 28-29). In these documents she accused members of the school administration of corruption and made other personal attacks upon them (R. 42a, 106-107, 109, 117).

The culmination of all this was reached during a class on September 14, 1970, when petitioner asked her students to respond to a series of questions, of which the following are examples (R. 42a-44a, 65-66, 71, 77):

> "What would your position be if you knew the president of the college you were attending like the sneak thief and the base robber that he is devicively took the dastardly administrative action of granting that deserving faculty member absolutely nothing at the final promotion meetings of P & B on Wednesday, October 22, 1969, and that dastardly administrative presidential action was taken without one scintilla of evidence against that deserving faculty member, and the dastardly administrative presidential action was taken in open defiance of the department chairman who had recommended that faculty member, and three, that dastardly administrative presidential act was taken in open defiance of the Dean of the Faculties who had recommended

that faculty member, and five, that dastardly administrative presidential action was taken in open defiance of the past acting president of Brooklyn College of the City University of New York who had recommended that faculty member?

* * *

What would your position be if you knew the president of the college you were attending was so thoroughly teacherous and so completely corrupt and so undisputably irresponsible that he sneakingly surveilled [sic] every single piece of mail that faculty member sent out and received, and this after that faculty member had gotten FBI clearance from the Securities Office of the college?

* * *

What would your position be if you knew the president of the college you were attending was so thoroughly unprincipled and so completely corrupt and so sexually deranged that he viciously hired indigenous spies in that faculty member's place of residence to make sexual passes at that faculty member and thereby not only wrongly and unjustly invading the privacy of that faculty member but unmistakingly harassing that faculty member in her place of residence?"

Examples of other such questions are found on pages 62-79 of the Record.

This resulted in petitioner's being suspended on charges calling for her dismissal because of conduct unbecoming a member of the instructional staff (R. 44a, 60a, 61a). The charges involved both her correspondence with administration members as well as her classroom assignment of September 14, 1970.

Hearings on the charges were held on September 24 and September 29, 1970 (R. 44a-45a). Petitioner expressly stated that she desired no legal representation (R. 4-5). At the September 24th hearing, she was permitted to speak at length (R. 8-87). We refer the Court to her statements at this hearing as evidence of her mental illness (*id.*).

Because petitioner was obviously mentally ill, the trial committee, with the help of petitioner's brother-in-law, worked out a solution whereby the charges were dropped in return for petitioner's applying for a medical leave of absence for the rest of the semester (R. 46a, 166-185). In applying for the leave, petitioner submitted a letter from a neurologist and psychiatrist which spoke of her "emotional upset" and "nervous condition" (R. 46a, 184).

Subsequently, in accordance with the By-laws of the Board of Higher Education, petitioner was examined both by a physician employed by the Board and by a physician acceptable both to the Board and to petitioner's physician, in order to determine her fitness to return to duty (R. 47a-49a). Both physicians found her mentally ill (R. 190, 192).

In accordance with the Board's By-laws, she was asked to apply for an additional medical leave of absence (R. 49a, 193). She refused (R. 49a, 194). Because of this refusal, the Board's By-laws dictated that she be tried on charges of neglect of duty (R. 50a, 195-199, 206).

Petitioner failed to attend the hearings on the neglect of duty charge, but her brother and brother-in-law appeared (R. 50a, 201, 208). The trial committee suggested that they apply for an additional medical leave of absence on her behalf by either [a] obtaining petitioner's authorization or [b] having a court appoint them her legal

guardians (R. 222, 228-233, 243-244). The case was adjourned so that her bother and brother-in-law could explore these possibilities (R. 230, 241-242, 246, 248, 252-253).

On the adjourned date, neither petitioner nor members of her family appeared (R. 248-253). In the interim, the trial committee received no word from petitioner's brother and brother-in-law (R. 250). The committee put into evidence some 600 pages of material sent by petitioner to the Chancellor of the University (R. 249-252, 254-867). We refer the Court to this material as further proof of petitioner's mental illness.

The neglect of duty charge was sustained (R. 868-869). Petitioner could have been dismissed; instead, it was recommended that she be retired for disability (R. 869-870).

ARGUMENT

Not even the semblance of a constitutional issue is presented.

There is no issue of academic freedom. The charges concerning petitioner's classroom assignment and her correspondence with administration members were dropped. Even if these charges had been pressed and petitioner had been found guilty, academic freedom would still not be an issue. There is a limit to how far a teacher can vent her spleen because of failure to be promoted.

The charges were dropped because it was evident that petitioner was mentally ill. In return, she agreed to apply for a medical leave of absence. As is evident from the physician's letter attached to her application, she knew she was applying for a leave of absence because of mental illness (R. 184).

She has not been permitted to return to duty because physicians, authorized to examine her, have found that her mental illness has continued. Under these circumstances, she was required to apply for a further leave of absence. She has refused. The Board could have dismissed her for neglect of duty because of this refusal. Instead, it sought to find a solution least damaging to her. It recommended that she be retired for disability. Upon such retirement, petitioner would not only receive a pension but would have the possibility of returning to teaching duty if a re-examination disclosed that she has recovered from her illness. N. Y. City Administrative Code, §B20-43.0.

CONCLUSION

The petition for certiorari should be denied, with costs.

September 1, 1972.

Respectfully submitted,

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